

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

JOHN MUSSACK,

Complainant,

and

MICHAEL HARANO, Former Principal,
Kailua Elementary School, Department of
Education, State of Hawaii,

Respondent.

CASE NO. CE-05-482

DECISION NO. 436

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

In the Matter of

JOHN MUSSACK,

Complainant,

and

MICHAEL HARANO, Principal, Kailua
Elementary School, Department of Education,
State of Hawaii,

Respondent.

CASE NO. CE-05-483

In the Matter of

JOHN MUSSACK,

Complainant,

and

HAWAII STATE TEACHERS
ASSOCIATION,

Respondent.

CASE NO. CU-05-190 (PARTS A AND B)

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

Between October 19, 2001 and November 2, 2001, Complainant JOHN MUSSACK (Complainant or MUSSACK), pro se, filed a series of five complaints (Case Nos.: CE-05-482, CE-05-483, CE-05-484, CE-05-485, and CE-05-486) with the Hawaii Labor Relations Board (Board) against agents of the Board of Education (Employer or BOE) alleging an assortment of violations of Complainant's rights under the applicable collective bargaining agreement.

The BOE filed a motion to dismiss the complaints on December 18, 2001. MUSSACK filed an opposition on January 8, 2002, and a hearing was held on the motion on January 11, 2002. The BOE's motion, which urged dismissal on grounds of timeliness, the failure to exhaust contractual remedies, and the failure to join indispensable parties, was taken under advisement by the Board.

Between January 14, 2002 and January 30, 2002, MUSSACK filed three further complaints against the HAWAII STATE TEACHERS ASSOCIATION (Union or HSTA) alleging that the Union failed its duty of fair representation by refusing to demand arbitration for the grievances filed in connection with the BOE complaints.

On March 11, 2002 MUSSACK filed a motion to, inter alia, dismiss some of the cases without prejudice which was granted, in part. See, Board Order No. 2071. On March 18, 2002, MUSSACK consolidated his remaining claims in an amended prohibited practice complaint which incorporated Case Nos.: CE-05-482, CE-05-483 and CU-05-190 (Parts A and B). Essentially, the remaining claims alleged that Kailua Elementary School Principal MICHAEL HARANO (HARANO) violated the collective bargaining agreement in the course of issuing oral and written reprimands to Complainant, and that the Union breached its duty of fair representation by failing to demand arbitration for MUSSACK's grievances on the subject.

On April 15, 2002, the Board conducted an evidentiary hearing on Complainant's claims against the Union. All parties were afforded a full and fair opportunity to be heard. Based upon a review of the record in this case, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Complainant was at all times relevant to this action a special education teacher at Kailua Elementary School. In that capacity he was a member of bargaining unit 05 and an employee within the meaning of Hawaii Revised Statutes (HRS) Chapter 89.

2. Respondent HARANO was at all times relevant to this action the principal of Kailua Elementary School. In that capacity, he was a representative of the BOE, a public employer, within the meaning of HRS Chapter 89.
3. Sam Moore (Moore) was at all times relevant to this action the HSTA Uniserve representative for the Windward District. In that capacity he served as a representative of the HSTA, the exclusive representative of bargaining unit 05 members, including Complainant, within the meaning of HRS Chapter 89.
4. In the fall of the 2000 school year, Complainant was in the course of his first year of teaching a special education class at Kailua Elementary School. His class consisted of seven special education students who were between four and seven years old. His duties included facilitating Individualized Education Programs (IEP) for each student.
5. On November 1, 2000, Principal HARANO issued an oral warning to Complainant regarding the manner in which Complainant facilitated IEP meetings. The oral warning was memorialized in a memorandum from HARANO to Complainant delivered on November 3, 2000.
6. The oral warning expressed concern that Complainant's facilitating of IEP meetings caused them to be "confusing, divisive and ultimately unproductive." Complainant Exhibit (Ex.) C-1. The memorandum detailed six incidents in which Complainant was alleged to have badgered or disturbed parents or, in the course of IEP meetings, accused the school of breaking the law or otherwise misrepresented the principal's instructions or positions.
7. On November 3, 2000, Complainant responded by memorandum to Principal HARANO's oral warning. In his response of one extensive paragraph, Complainant accused HARANO of lying five times, accused HARANO of altering IEPs, refusing to allow conferences, and depriving children and parents of their rights. HSTA Ex. 4.
8. On November 6, 2000, Complainant by memorandum to HARANO demanded, pursuant to his collective bargaining agreement,¹ that HARANO arrange meetings with all persons who registered serious complaints against him.

¹Article XI-D of the applicable Unit 05 collective bargaining agreement provides in relevant part:

Any teacher against whom a serious complaint has been filed will have the opportunity to meet with the complainant(s).

9. On December 11, 2000, Complainant reiterated his demand for meetings with any complainants and, after referencing a November 28, 2000 informal conference with HARANO regarding the oral reprimand, he advised that "I may proceed with the Step 1 grievance at any time without further notification." HSTA Ex. 6.
10. On January 11, 2001, HARANO issued a written reprimand to Complainant. The letter alleged continued inappropriate behavior at IEP meetings and a failure to correct conduct addressed in the oral warning.
11. On February 12, 2001, Complainant filed a grievance form with the Department of Education (DOE) Windward District Office. The grievance alleged that the Employer issued a letter of reprimand without proper cause and sought to have the written reprimand rescinded (written reprimand grievance). The form identified the date of the violation as January 11, 2001 and was marked as received on February 13, 2001.
12. On February 13, 2001, Complainant filed another grievance form with the DOE Windward District Office. The grievance alleged that the Employer issued an oral warning without proper cause and sought to have the oral warning rescinded (oral reprimand grievance). The form identified the date of the violation as January 22, 2001.
13. On February 13, 2001, the written reprimand grievance was returned to Complainant by LEA ALBERT, District Superintendent. The accompanying memorandum asserted that the grievance did not comply with Article V of the bargaining agreement because it was not filed within 20 days of the occurrence of the alleged violation.
14. On or around February 23, 2001, Complainant, by letter to the Superintendent of Education, appealed the District Superintendent's rejection of his written reprimand grievance. Complainant acknowledged that the grievance was not received within 20 working days of the occurrence. However, he argued, inter alia, that an intervening waiver day (non-instructional workday) should not be counted in the calculation of 20 days so that his filing was timely.
15. On March 2, 2001, the Superintendent of Education responded to Complainant's appeal regarding the untimely filing of his written reprimand grievance. The Superintendent affirmed the failure to timely file and again returned the grievance.
16. On March 12, 2001, the DOE, by letter from Personnel Specialist Francine W. Honda, advised Complainant that arrangements had been made through Moore to conduct a Step 2 grievance meeting regarding his oral warning grievance on March 16, 2001.

17. Moore served as an HSTA Uniserve representative for Windward Oahu since 1971. At the time of Complainant's instant grievances, Moore's duties included assisting approximately 950 teachers at 22 Windward District schools in matters requiring Union representation or assistance. In that capacity he provided assistance in approximately 30 grievances per year. Most of the grievances were filed by the Union on behalf of aggrieved teachers. Although teachers were free to file grievances without the assistance or representation of the Union,² Moore testified that in his experience it was extremely rare for them to do so.
18. With respect to Complainant's grievances here at issue, Moore testified that he was not aware of either the reprimands or grievances until after Complainant had filed the grievances on his own. Complainant, however, testified that he had informally advised Moore of the oral warning on or around November 17, 2000, and had asked generally for assistance. Moore had no recollection of any such communication. The Board finds Moore's testimony to be far more credible. At no point in either the instant proceedings or the processing of the grievance has Complainant alleged that the Union was requested to file grievances on his behalf and wrongfully failed to do so.
19. Moore testified that he learned of the oral warning grievance only after it was filed by Complainant. This is supported by a letter from Moore to Complainant dated February 23, 2001, in which he references being informed two weeks prior of the possible filing of two grievances and requested copies.
20. Subsequent to Moore's request for copies of the grievances, Complainant requested Moore's assistance in pursuing the oral warning grievance. Although Moore recognized that the grievance was probably untimely, he convinced the DOE to do him a favor and convene a meeting at Step 2 of the grievance procedure.
21. By letter dated March 23, 2001, Complainant wrote Moore regarding several administrative and disciplinary proceedings in which he was apparently involved. These included being on continued probationary status, being placed on administrative leave, and an alleged inability to confront persons who had complained about him. The letter also included a request to "continue grieving any and all disciplinary action...through arbitration if necessary." Complainant Ex. C-13.

²Article V-C, of the Unit 05 collective bargaining agreement provides, in part:

An individual teacher of the bargaining unit may present a grievance at any time to the Employer and have the grievance heard without intervention of the Association,

22. On March 27, 2001, Moore represented MUSSACK at the Step 2 meeting. Complainant concedes that Moore represented him quite well. Moore testified that after the meeting he advised Complainant that the problem of timeliness was fatal and insurmountable so that his grievance would be denied. Moore claims to have further advised that arbitration would not be pursued because any such effort would be futile since in his 21 years of experience, the DOE and HSTA had never deviated from the strict application of the 20-day requirement. Moore further testified that Complainant did not request that a demand for arbitration be made for the oral warning grievance. Moore claims that if Complainant had so requested, a pro forma demand for arbitration would have been issued since it was his practice to accede to a member's request in such matters. He further noted that he had filed demands for arbitration in three other grievances by Complainant. Moore also testified that although he had never been asked to provide assistance on Complainant's written reprimand grievance, he advised Complainant that the same rules regarding timeliness would apply, thereby making arbitration futile.
23. Complainant's testimony regarding the conversation following the Step 2 meeting differs substantially. Complainant testified that after the meeting, Moore advised him that his grievance was a good one which could be sustained through arbitration. He accordingly believed that it would be so pursued.
24. The Board adopts Moore's testimony as its finding of fact regarding the conversation that took place after the Step 2 meeting. The adopting of Moore's testimony in light of conflicting testimony by the Complainant is based upon a credibility determination. Moore's testimony was supported by unrebutted representations as to past practice, is consistent with the BOE's interpretation and application of the law, and Moore's having taken other grievances by Complainant to arbitration which bolsters his credibility. The finding is also based upon demeanor and presentation.
25. By letter signed by hearings officer Donald Nugent, dated April 4, 2001, the BOE denied Complainant's Step 2 grievance on the oral warning on the basis of timeliness.
26. By letter dated May 17, 2001, Moore wrote Complainant in response to what was apparently a number of express concerns. Moore expressed concerns that Complainant had "told me [Moore] that your actions of 'papering them to death' is on the advice of your attorney." Moore purported to have "informed you that I would not be creating documents for your planned litigation against your employer and others. I told you I would honestly represent you but it is not the service of the HSTA or me to help you set people up for litigation or to create documents for your use in future litigation." HSTA Ex. 20.

27. By letter dated July 23, 2001, Complainant wrote Ms. Georgiana Alvaro, Acting Deputy Director of the HSTA. The letter purports to be upon advice of a consulted attorney, Michael J. Green, and relates to "seven current grievances that have long since passed their timelines." The letter requests that "all seven grievances [be] advanced as quickly as possible, or ...notification of the disposition of their respective demands-for-arbitration." Complainant Ex. C-15.
28. By letter dated August 29, 2001, attorney Ronald Fujiwara (Fujiwara), representing Complainant, wrote Moore and, inter alia, requested that arbitration be demanded for another grievance that had been denied at Step 2 and inquired as to the status of the written reprimand grievance which had been returned pursuant to the March 2, 2001 letter from Sandra McFarlane, Superintendent's Designated Representative.
29. By letter dated September 27, 2001, Moore wrote Complainant purporting to have received notice that Complainant desired that the Union, rather than his attorney, represent him in his pending grievances.
30. By letter dated October 4, 2001, Fujiwara again wrote to Moore and, among other things, conveyed a request by Complainant that the Union respond "yes" or "no" to whether demands for arbitration had been submitted in seven enumerated grievances, including the oral warning and written reprimand grievances. Complainant Ex. C-18.
31. By letter dated October 15, 2001, Moore advised Fujiwara that "None of the alleged grievances listed by you have demands for arbitration submitted." Union Ex. 22.
32. By letter dated October 17, 2001, Fujiwara advised Moore that Moore's response regarding arbitration would be deemed to be "no" and that Complainant would "be soon filing Prohibited Practice Complaint(s) against the Department of Education, State of Hawaii, regarding one or more of the grievances related thereto."
33. On October 19, 2001, Complainant filed the instant Prohibited Practice Complaint against HARANO. And on January 14, 2002, Complainant filed the instant Prohibited Practice Complaint against the HSTA.

DISCUSSION

Complainant seeks relief for alleged violations of the applicable collective bargaining agreement. Generally, such alleged violations are adjudicated through the bargaining agreement's grievance process. And Chapter 89 expressly authorizes parties to a collective bargaining agreement to establish a "grievance procedure culminating in final

and binding decision...” (Emphasis added.) HRS § 89-11(a). Chapter 89, however, also provides the Board with jurisdiction over alleged contractual violations by either an employer or exclusive representatives via its authority to adjudicate prohibited practices complaints. HRS §§ 89-13(a)(8) and 89-13(b)(5). This jurisdictional dilemma is usually resolved by the Board’s deferral to the arbitration process.³ Thus the Board has deferred to the contractual grievance process⁴ except where there exists countervailing policy considerations⁵ or the Union’s failure to satisfy its duty of fair representation effectively deprives the claimant of access to the grievance process.⁶

Such voluntary declination of jurisdiction is akin to the requirement that parties exhaust contractual remedies before access is afforded by the Board. The Hawaii Supreme Court in Santos v. State, Dept. of Transp., Kauai Div., 64 Haw. 648, 655, 646 P.2d 962 (1982) has stated that “It is the general rule that before an individual can maintain an action against his employer, the individual must at least attempt to utilize the contract grievance procedures agreed upon by his employer and the [union]. (citation omitted) The rule is in keeping with the prevailing National Labor Relations policy and Hawaii policy favoring arbitration as a dispute settlement mechanism.” (citations omitted.) Application of this rule permits a voluntary declination of jurisdiction and has often been adopted and applied by this Board when a claimant has failed to fully exhaust available contractual remedies. See, e.g., Hawaii State Teachers Association, 1 HPERB 253 (1972) (HSTA).

In the instant cases, the Board finds no countervailing policy considerations which mitigate in favor of assuming jurisdiction. Accordingly, unless the Complainant can demonstrate that the Union failed its duty of fair representation, the Board will defer to the grievance process and decline jurisdiction with respect to the Complainant’s complaint against the employer.

CASE NO. CU-05-190 (PARTS A AND B)

The Complainant alleges that the Union failed its duty of fair representation when it did not demand arbitration for his written and oral reprimand grievances. The Union asserts that the Complainant’s prohibited practice complaints were not timely filed and that it did not fail its duty.

³“It shall be the policy of this Board to attempt to foster the peaceful settlement of disputes, wherever appropriate, and application by deferral of matters concerning contractual interpretation to the arbitration process agreed to by the parties.” Hawaii State Teachers Association, 1 HPERB 253, 261 (1972).

⁴See, e.g., State of Hawaii Organization of Police Officers, 6 HLRB 25 (1998).

⁵See, e.g., Hawaii State Teachers Association, *supra*, (arbitration fruitless and parties waive arbitration); Hawaii State Teachers Association, 1 HPERB 442 (1974) (speed); and Hawaii Government Employees Association, 1 HPERB 641 (1977) (subject not covered by contract).

⁶Vaca v. Sipes, 386 U.S. 171, 190-91, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

Hawaii Administrative Rules (HAR) §12-42-42(a) identifies the limitations period applicable to the filing of prohibited practices complaints under HRS § 89-13. It provides as follows:

Complaints that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, may be filed...within ninety days of the alleged violation.

The Board has construed the limitations period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HLRB 186 (1983).

In the instant complaint, the Union had ten days after a denial of Step 2 to request arbitration.⁷ Thus any actionable failure on the part of the Union because of its failure or refusal to demand arbitration occurred ten days after March 2, 2001 with respect to the written reprimand, and April 4, 2001 with respect to the oral warning, the dates of written notice of Step 2 denials. The prohibited practice complaint filed more than nine months after the latest date would appear to clearly fall outside of the prescribed 90-day limitations period. Complainant, however, appears to argue that the complaint is not barred because Union failed to advise him if its failure to demand arbitration so that it was not until Moore's letter of October 15, 2001, where he was advised that none of the grievances had been submitted to arbitration, should be viewed as the beginning of the limitations period. We do not find this to be the case. The beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Instead, the period begins to run when "an aggrieved party knew **or should have known** that his statutory rights were violated." Metromedia, Inc., KMBC TV v N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978) (emphasis added.)

In the instant case, Complainant had more than ample cause and opportunity to know that the Union would not demand arbitration. Moore testified, and the Board has adopted as a finding, that after the Step 2 grievance meeting of March 27, 2001, Moore advised Complainant that arbitration was fruitless and would not be pursued for either grievance because the grievances were not timely. The Board concludes that this date represents the time at which Complainant knew or should have known of the Union's alleged failure. Thus the complaints filed in January of 2002 are untimely and must be dismissed.

⁷Art. V- E. 2 of the Unit 05 collective bargaining agreement provides, in part:

... the Association may present a request for arbitration of the grievance within ten (10) days after the receipt of an answer at Step 2.

Duty of Fair Representation

Even if Complainant's complaint had been timely filed, dismissal would be required in that the Board could not have concluded that the Union violated its duty of fair representation.

In order for an employee to prevail against his union, it must be established by a preponderance of evidence that the union's conduct in prosecuting, or failing to prosecute, the grievance was arbitrary, discriminatory or in bad faith. Sheldon S. Varney, 5 HLRB 508 (1995). Proof of union error due to negligence, inefficiency, inexperience, or even a misguided interpretation of contract provisions will not suffice. Bruce J. Ching, 2 HPERB 23 (1978).

Moore testified, and the Board has found, that the decision not to demand arbitration in either of Complainant's grievances was based on the longstanding practice of strictly construing time limits and calculating them based on work days rather than instructional days. Complainant may have offered novel interpretations of the contractual deadlines, but did not in any way demonstrate that the Union's interpretation and corresponding decisions were arbitrary, discriminatory or in bad faith. Accordingly, Complainant could not have prevailed and the complaints against the Union would, in any event, have been dismissed.

CASE NOS.: CE-05-482, CE-05-483

Complainant's complaints against the Employer seeks to have the Board adjudicate the substance of Complainant's grievances. As noted above, the Board will decline jurisdiction over such claims in deference to the contractual grievance process absent some countervailing policy consideration or breach of the duty of good faith. No such policy consideration or breach having been found in the instant case, it must be dismissed in deference to the contractual grievance process.

CONCLUSIONS OF LAW

1. Allegations of the employer's violation of the collective bargaining agreement are generally adjudicated through the bargaining agreement's grievance process. Thus the Board has deferred to the contractual grievance process except where there are countervailing policy considerations or the union's failure to satisfy its duty of fair representation effectively deprives the claimant of access to the grievance process.
2. In the instant cases, the Board finds no countervailing policy considerations which mitigate in favor of assuming jurisdiction and will defer to the grievance process and decline jurisdiction over Complainant's complaint against the employer unless the Complainant can demonstrate that the Union failed its duty of fair representation.

3. Prohibited practice complaints must be filed with the Board within 90 days of the alleged violation.
4. The beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Instead, the period begins to run when an aggrieved party knew or should have known that his or her statutory rights were violated.
5. As against the Union, Complainant knew or should have known that the HSTA would not seek arbitration of his grievances when Moore advised Complainant after the Step 2 meeting on the oral warning grievance on March 27, 2001 that the grievances were untimely, such defect was fatal, and arbitration would be fruitless. In addition, as the Union's demand for arbitration must be submitted within ten days of the Step 2 decisions, i.e., March 2, 2001 with respect to the written reprimand and April 4, 2001 with respect to the oral warning, Complainant knew or should have known in March or April of 2001 that HSTA did not file the demands for arbitration on the grievances. Accordingly, Case No. CU-05-190 (Parts A and B) which was filed on January 14, 2002 was filed beyond the applicable limitations period and the Board lacks jurisdiction over the complaint against the Union.
6. Assuming arguendo, that the complaint was timely, the Board concludes based on the record that the Union did not violate its duty of fair representation by deciding not to arbitrate Complainant's grievances which the Union determined were untimely. Complainant did not demonstrate that the Union's interpretation and corresponding decisions were arbitrary, discriminatory or made in bad faith.
7. The Board declines jurisdiction over Case Nos.: CE-05-482 and CE-05-483 against the Employer in deference to the contractual grievance process.

ORDER

The Board hereby dismisses the instant prohibited practice complaints.

DATED: Honolulu, Hawaii, _____ August 23, 2002 _____.


HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair

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CHESTER C. KUNITAKE, Member


KATHLEEN RACUYA-MARKRICH, Member

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